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5 **UNITED STATES DISTRICT COURT**
6 **SOUTHERN DISTRICT OF CALIFORNIA**

7 Erik Kellgren, Individually and on)
8 Behalf of All Other Persons)
9 Similarly Situated,)
10 Plaintiffs,)
11 -against-)
12 PETCO ANIMAL SUPPLIES, INC.;)
13 PETCO HOLDINGS, INC.; and)
14 DOES 1 to 100, inclusive,)
15 Defendants.)

}) CIVIL ACTION:

}) **'13CV0644 W KSC**
}) **COMPLAINT AND JURY**
}) **DEMAND**

16 Plaintiff Erik Kellgren, individually and on behalf of all persons similarly
17 situated (hereafter, "Plaintiff"), by his attorneys, upon personal knowledge as to
18 himself and upon information and belief as to other matters, alleges as follows:

20 **NATURE OF THE ACTION**

21 1. Plaintiff alleges, on behalf of himself and other similarly situated
22 current and former assistant managers, similarly situated current and former
23 assistant store managers, and similarly situated current and former employees
24 holding comparable positions but different titles employed by Defendants Petco
25 Animal Supplies, Inc., Petco Holdings, Inc., and DOES 1 to 100 (collectively,
26 "Defendants") within the United States of America at any time since March 19,
27
28

1 2010 to the present, who elect to opt into this action pursuant to the FLSA, 29
 2 U.S.C. § 216(b) (hereinafter, the “Collective Action Members”), that they are: (i)
 3 entitled to unpaid overtime wages for hours worked above 40 in a workweek, as
 4 required by law, and (ii) entitled to liquidated damages pursuant to the FLSA, 29
 5 U.S.C. §§ 201, *et seq.*
 6

7 2. Defendants willfully violate the FLSA and its supporting regulations
 8 by misclassifying Plaintiff and the Collective Action Members, failing to pay the
 9 Collective Action Members for all overtime hours worked, failing to pay the
 10 Collective Action Members overtime at a rate of time and one-half for all hours
 11 worked above 40 in a workweek, and failing to pay overtime on a timely basis.
 12 Plaintiff and the Collective Action Members are entitled to unpaid overtime
 13 wages from Defendants for all hours worked by them above 40 in a workweek
 14 and are also entitled to liquidated damages pursuant to the FLSA.
 15

16 **JURISDICTION AND VENUE**
 17

18 3. The Court has subject matter jurisdiction over Plaintiff’s FLSA claims
 19 pursuant to 28 U.S.C. §§ 1331 and 1337 and 29 U.S.C. § 216(b).
 20

21 4. Defendants are subject to personal jurisdiction in the State of
 22 California.
 23

24 5. Venue is proper pursuant to 28 U.S.C. § 1391 because a substantial
 25 part of the events or omissions giving rise to the claims occurred in this District
 26 inasmuch as Defendants have their principal place of business in this District.
 27
 28

1 6. This Court is empowered to issue a declaratory judgment pursuant to
2 28 U.S.C. §§ 2201 and 2202.
3

4 7. Plaintiff's claims involve matters of national or interstate interest.
5
6

THE PARTIES

Plaintiff

9 8. Plaintiff was, at all relevant times, an adult individual over the age of
10 eighteen (18), residing in Illinois.
11

12 9. Plaintiff was employed by Defendants from approximately 2007 until
13 October 2010, as an assistant store manager at Defendants' stores located in St.
14 Charles, Illinois, Aurora, Illinois, Oswego, Illinois and Shorewood, Illinois.
15

16 10. At all relevant times, Plaintiff and the Collective Action Members
17 were engaged in commerce or in the production of goods for commerce as
18 described in 29 U.S.C. §§ 206 and 207.
19

Defendants Petco Animal Supplies, Inc. and Petco Holdings, Inc.

21 11. Upon information and belief, Defendant Petco Animal Supplies, Inc.
22 is a Delaware corporation with its principal places of business at 9125 Rehco
23 Road, San Diego, California. According to its website, Petco Animal Supplies, Inc.
24 is a privately held company with more than 1,150 specialty retail stores
25 nationwide, selling pet food, live animals, pet supplies and related goods and
26 services.
27
28

1 12. Upon information and belief, Defendant Petco Holdings, Inc. is a
2 Delaware corporation with its principal place of business at 9125 Rehco Road, San
3 Diego, California.

4
5 13. Defendants Petco Animal Supplies, Inc. and Petco Holdings, Inc.
6 were and are doing business in California, including at their retail locations
7 throughout the State of California.

8
9 14. At all relevant times, Defendants Petco Animal Supplies, Inc. and
10 Petco Holdings, Inc. have employed Plaintiff and the Collective Action Members
11 within the meaning of the FLSA.

12
13 15. Defendants Petco Animal Supplies, Inc. and Petco Holdings, Inc. are
14 each covered employers within the meaning of the FLSA. Defendants Petco
15 Animal Supplies, Inc. and Petco Holdings, Inc. have been and continue to be
16 enterprises engaged in commerce or the production of goods for commerce within
17 the meaning of the FLSA.

18
19 16. Defendants Petco Animal Supplies, Inc. and Petco Holdings, Inc.
20 employed employees (including Plaintiff and the Collective Action Members) who
21 were engaged in commerce or the production of goods for commerce.

22
23 17. Upon information and belief, Defendant Petco Animal Supplies, Inc.
24 and Defendant Petco Holdings, Inc. each had annual gross revenues in excess of
25 \$500,000 for all relevant periods herein.

1 18. Defendants Petco Animal Supplies, Inc. and Petco Holdings, Inc.
 2 operate in concert and together in a common enterprise and through related
 3 activities, so that the actions of one may be imputed to the other, and/or they
 4 operate as joint employees within the meaning of the FLSA, and/or were otherwise
 5 legally responsible in some way for the matters alleged herein and proximately
 6 caused Plaintiff and the Collective Action Members to be subject to the unlawful
 7 pay practices described in this Complaint.
 8

9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 ***Defendant DOES 1 to 100, inclusive***

12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 19. Plaintiff does not know the true names or capacities, whether
 individual, partner or corporate, of DOES 1 to 100, inclusive and for that reason,
 DOES 1 to 100 are sued under such fictitious names.

19 20 21 22 23 24 25 26 27 28 20. Plaintiff will seek leave of court to amend this Complaint to allege
 such names and capacities as soon as they are ascertained.

20 21 22 23 24 25 26 27 28 **PLAINTIFF'S WAGE AND HOUR FACTUAL ALLEGATIONS**

21 22 23 24 25 26 27 28 21. Plaintiff and the Collective Action Members worked for Defendants
 as assistant managers, assistant store managers, and other comparable positions
 holding different titles at various times during the FLSA statutory period.

25 26 27 28 21 22 23 24 25 26 27 28 22. The primary duties and responsibilities of Plaintiff and the Collective
 Action Members are virtually identical from region to region, district to district,
 facility to facility, and employee to employee. Any differences in job activities

between the different individuals in these positions were and are legally insignificant to the issues presented by this action.

23. Plaintiff and the Collective Action Members performed similar primary job duties, including:

- a. cashiering;
- b. stocking;
- c. assisting customers;
- d. unpacking merchandise;
- e. cleaning and straightening the store;
- f. organizing the store according to detailed corporate directives called planograms;
- g. unloading delivery trucks; and
- h. caring for pets, including cleaning cages.

24. The work performed by Plaintiff and the Collective Action Members required little skill and no capital investment. Their duties did not principally include managerial responsibilities.

25. Plaintiff's and the Collective Action Members' primary job duties did not include:

- a. interviewing;
- b. hiring;
- c. disciplining other employees; or

d. firing.

26. Plaintiff's and the Collective Action Members' job duties as exempt assistant managers, assistant store managers, and other comparable positions holding different titles did not differ substantially from the duties of the non-exempt hourly-paid store employees, which included stocking shelves, unloading delivery trucks, and cashier and cleaning duties.

27. Plaintiff and the Collective Action Members did not exercise a meaningful degree of independent discretion with respect to their job duties, due to Defendants' policies, procedures, and practices.

28. The primary duties of Plaintiff and the Collective Action Members were manual in nature. The performance of manual duties occupied the majority of their working hours.

29. Consistent with Defendants' policies, patterns, and practices, Plaintiff and the Collective Action Members regularly worked in excess of 40 hours per workweek without being paid overtime compensation.

30. Defendants were or should have been aware that federal law required Defendants to pay employees performing non-exempt duties an overtime premium for hours worked in excess of 40 per week.

31. Defendants assigned all of the work that Plaintiff and the Collective Action Members performed, and/or Defendants are aware of all the work that Plaintiff and the Collective Action Members performed.

32. Pursuant to Defendants' centralized company-wide policies, patterns, and practices, Defendants classified Plaintiff and the Collective Action Members as exempt from coverage of the overtime provisions of the FLSA, and have not paid overtime wages to them for hours worked in excess of 40 in a workweek.

33. Defendants did not perform a person-by-person analysis of Plaintiff's or the Collective Action Members' job duties when making the decision to classify them as exempt from the FLSA's overtime protections.

34. As part of their regular business practice, Defendants have intentionally, willfully, and repeatedly engaged in a policy, pattern, and/or practice of violating the FLSA with respect to Plaintiff and the Collective Action Members. This policy, pattern, and/or practice includes, but is not limited to:

- a. willfully misclassifying Plaintiff and the Collective Action Members as exempt from the overtime requirements of the FLSA; and
- b. willfully failing to pay Plaintiff and the Collective Action Members overtime wages for hours they worked in excess of 40 hours per week.

35. Upon information and belief, Defendants' unlawful conduct described in this Complaint is pursuant to a corporate policy, pattern, and/or practice of minimizing labor costs by violating the FLSA.

1 36. Defendants' failure to pay overtime wages for work performed by
 2 Plaintiff and the Collective Action Members in excess of 40 hours per week was
 3 willful.
 4

5 37. Defendants' unlawful conduct has been widespread, repeated and
 6 consistent.
 7

8 38. Upon information and belief, throughout all relevant time periods
 9 while Defendants employed Plaintiff and the Collective Action Members,
 10 Defendants failed to maintain accurate and sufficient time records.
 11

COLLECTIVE ACTION ALLEGATIONS

13 39. Pursuant to 29 U.S.C. §§ 207 and 216(b), Plaintiff seeks to prosecute
 14 his FLSA claims as a collective action on behalf of all persons who are employed
 15 or were formerly employed by Defendants as assistant managers, assistant store
 16 managers, and any other similarly situated current and former employees holding
 17 comparable positions but different titles in the United States at any time since
 18 March 19, 2010, to the entry of judgment in this case, whom Defendants classified
 19 as exempt employees within the meaning of the FLSA, and who did not receive
 20 any overtime compensation.
 21
 22

24 40. Defendants are liable under the FLSA for, *inter alia*, failing to
 25 properly pay overtime wages to Plaintiff and the Collective Action Members.
 26

27 41. There are many similarly situated current and former assistant
 28 managers, assistant store managers, and other employees holding comparable

1 positions but different titles who have not been paid proper overtime wages in
2 violation of the FLSA and who would benefit from the issuance of a court-
3 supervised notice of this lawsuit and the opportunity to join it. Thus, notice should
4 be sent to the Collective Action Members pursuant to 29 U.S.C. § 216(b). Upon
5 information and belief, there are at least 500 Collective Action Members during the
6 Collective Action Period, most of whom would not be likely to file individual suits
7 because they lack adequate financial resources, access to attorneys, and/or
8 knowledge of their claims.

12. The similarly situated Collective Action Members are known to
13 Defendants, are readily identifiable, and can be located through Defendants'
14 records.

16. Plaintiff knows of no difficulty that will be encountered in the
17 management of this litigation that would preclude its maintenance as a collective
18 action.

20. / / /

21. / / /

22. / / /

24. / / /

25. / / /

27. / / /

**FIRST CAUSE OF ACTION:
FAIR LABOR STANDARDS ACT**

44. Plaintiff, on behalf of himself and the Collective Action Members, realleges and incorporates by reference paragraphs 1 through 43 as if they were set forth again herein.

45. Defendants have engaged in a widespread pattern and practice of violating the FLSA, as detailed in this Complaint.

46. Plaintiff consents in writing to be a party to this action, pursuant to 29
U.S.C. § 216(b). Plaintiff's consent is attached as Exhibit A.

47. At all relevant times, Plaintiff and other similarly situated current and former employees were engaged in commerce and/or the production of goods for commerce within the meaning of 29 U.S.C. §§ 206(a) and 207(a).

48. The overtime wage provisions set forth in 29 U.S.C. §§ 201, *et seq.*, apply to Defendants.

49. Defendants are employers engaged in commerce and/or the production of goods for commerce within the meaning of 29 U.S.C. §§ 206(a) and 207(a).

50. At all times relevant, Plaintiff and the Collective Action Members were employees within the meaning of 29 U.S.C. §§ 203(e) and 207(a).

51. Defendants have failed to pay Plaintiff and the Collective Action Members the overtime wages to which they were entitled under the FLSA

1 52. Defendants' violations of the FLSA, as described in this Complaint,
 2 have been intentional and willful. Defendants have not made a good faith effort to
 3 comply with the FLSA with respect to the compensation of the Plaintiff and the
 4 Collective Action Members.

5 53. Because Defendants' violations of the FLSA have been willful, a
 6 three year statute of limitations applies, pursuant to 29 U.S.C. § 255.

7 54. At all relevant times, Defendants employed Plaintiff, and employed or
 8 continues to employ the Collective Action Members, within the meaning of the
 9 FLSA.

10 55. Upon information and belief, at all relevant times, each Defendant has
 11 had gross revenues in excess of \$500,000.

12 56. As a result of Defendants' violations of the FLSA, Plaintiff and the
 13 Collective Action Members have suffered damages by being denied overtime
 14 wages in accordance with 29 U.S.C. §§ 201, *et seq.*

15 57. As a result of the unlawful acts of Defendants, Plaintiff and the
 16 Collective Action Members have been deprived of overtime compensation and
 17 other wages, in amounts to be determined at trial, and are entitled to recover such
 18 amounts, liquidated damages, prejudgment interest, attorneys' fees, costs,
 19 disbursements, and other compensation, pursuant to 29 U.S.C. § 216(b).

20 58. The foregoing conduct, as alleged, constitutes a willful violation of
 21 the FLSA within the meaning of 29 U.S.C. § 255(a).

PRAYER FOR RELIEF

Wherefore, Plaintiff, on behalf of himself and the Collective Action Members, respectfully requests that this Court grant the following relief with regard to the Claims asserted herein:

- a. At the earliest possible time, designation of this action as a collective action on behalf of the Collective Action Members and prompt issuance of notice pursuant to 29 U.S.C. § 216(b) to the Collective Action Members (i) apprising them of the pendency of the claims asserted in this action under Section 216(b) of the FLSA, and (ii) permitting them to assert timely Section 216(b) FLSA claims in this action by filing individual Consents to Sue pursuant to 29 U.S.C. § 216(b);
- b. Equitable tolling of the statute of limitations;
- c. A declaratory judgment that the practices complained of herein are unlawful under the FLSA;
- d. An award of unpaid wages in the maximum amount allowed for all hours worked as well as overtime compensation due under the FLSA;
- e. An award of statutory, liquidated, and/or punitive damages as a result of Defendants' willful failure to pay all overtime compensation pursuant to 29 U.S.C. § 216;

1 f. An award of damages representing Defendants' share of FICA,
2 FUTA, state unemployment insurance and any other required
3 employment taxes;

4 g. An award of prejudgment and post-judgment interest;

5 h. An award of costs and expenses of this action together with
6 reasonable attorneys' and expert fees; and

7 i. Such other and further relief as this Court deems just and proper.

8

9

10 **DEMAND FOR TRIAL BY JURY**

11

12 Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff
13 demands a trial by jury on all questions of fact raised by this Complaint.

14

15 Dated: Los Angeles, California

16 Dated: March 19, 2013

17 By: /s/ Kevin T. Barnes
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*to apply for admission *pro hac vice*

EXHIBIT A

CONSENT TO BECOME A PARTY PLAINTIFF

By my signature below, I hereby authorize the filing and prosecution of claims in my name and on my behalf in a collective and class action, to contest the alleged failure of Defendants Petco Animal Supplies, Inc. and Petco Holdings, Inc. and/or their parent, subsidiary, predecessor, successor, affiliated, and related companies (collectively "Petco") to pay me overtime wages as required under federal law and also authorize the filing of this consent in a lawsuit challenging such conduct. I hereby designate Plaintiff's counsel to represent me in the suit and to make decisions on my behalf concerning the litigation and settlement. I agree to be bound by any adjudication of this action by the Court, whether it is favorable or unfavorable. I also consent to join any separate or subsequent action or arbitration proceeding to assert my claim against Petco and/or other entities and/or persons potentially liable.



Signature

Erik Kellgren

Printed Name

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